Dear Chair Gregersen and Members of the Public Employment Relations Board,

I am submitting herewith a comment concerning the Board's Case Processing Initiative Report. The comment being submitted is from a current employee of PERB who does not wish to be identified. I therefore offered to submit this comment unedited for the Board's consideration.

Sincerely,

Daniel Trump
Representative – Union of PERB Employees

Suggestion H.1.2. to designate certain charging parties "vexatious litigants" and limit their rights to amend complaints and/or re-file charges. Because H.1.2. affects the rights of parties, the designation "vexatious litigant" would seem to require a formal determination by PERB, presumably on a noticed motion by an opposing party or as an order to show cause issued by a Board agent. It seems doubtful that the additional process required for making this determination would justify any "savings" obtained from limiting the rights of the party to amend or re-file charges, particularly since the designation would also be subject to administrative appeal, thereby requiring additional Board resources just to designate a person a "vexatious litigant" and then to hear any appeal to the Board from this designation.

H.1.3 suggests making e-fling mandatory and allowing for e-signatures. PERB should consider ways to incentivize electronic filing (perhaps by doing away with the separate requirement that documents also be filed in paper format), but mandatory e-filing seems excessive.

H.1.7 suggests placing page limits on unfair practice charges and supporting materials. Rather than set hard-and-fast page limits, it would be preferable to utilize other options. In some early Board decisions, opposing parties filed a "motion to particularize" a charge, essentially asking the agency to require the charging party to spell out its theories or to clarify its allegations. Presumably, the Board agent could do this as well through some combination of telephone conversations and the "unless otherwise agreed" language found in PERB Regulation 32620, subdivision (d), which requires the investigating Board agent to "advise the charging party in writing of any deficiencies in the charge in a warning letter, u***nless otherwise agreed by the Board agent and the charging party***, prior to dismissal of any allegations contained in the charge." (Emphasis added.) The Board agent should document any verbal agreements by indicating that charging party agreed that only the following allegations are included in the charge, and then sending a copy to the charging party and the respondent.

H.1.9 would establish an expedited process for charges based on the "level of complexity" of the charge. One problem would be allowing charging parties to game the process through artful pleading, including alleging matters that have no merit, but would trigger the expedited process for the remainder of the allegations in the charge. The complexity would presumably need to be based on the allegations of the charge and not on their merits (since deciding whether the charge will go through an expedited process necessarily precedes determining the merits of the charge allegations). An otherwise non-complex allegation could be ensured expedited treatment by including a meritless allegation involving, e.g., retaliation for union activities, backpay or other economic liability, bad faith bargaining, or some other category of cases designated for expedited treatment.

H.1.8 suggests providing additional training and information to guide pro per charging parties in unfair practice proceedings. In addition to this suggestion, the Board can better address this problem through decisional law, for example, by explaining why a charge is deficient or why particular appeal or statement of exceptions does not meet the minimum requirements of PERB

Regulations. However, to maximize the audience, such decisions should be designated precedential. If designated non-precedential, it is considerably less likely they will be seen by future litigants who are seeking guidance through the Board's decisional law.

H.1.11 suggests restricting unalleged violations from consideration, apparently by stipulation of the parties. Part of the problem is already addressed by a combination of regulations and decisional law, albeit the issue is being reviewed by the California Court of Appeal. (See PERB Regs. 32647, 32648; *Fresno County Superior Court* (2017) PERB Decision No. 2517-C [currently on review]; see also *City of Roseville* (2016) PERB Decision No. 2505-M [allegations that serve as evidence in support a theory of liability identified in the complaint are not "unalleged violations" and therefore are not subject to the unalleged violations doctrine.)

L.1.12 similarly suggests an acknowledgement form for charging parties that they cannot raise issues not included in the written complaint. Unclear whether this would be the directed only at eliminating unalleged violations or also would serve as a waiver of charging party's rights under PERB Regs 32647 and 32648 to move to amend the complaint before or during the hearing.

H.3.11 suggests allowing for a "bench decision" upon completion of a hearing, apparently in lieu of a written proposed decision. L.3.3. similarly suggests expedited hearing process in which ALJ issues a statement of decision on the record in lieu of written findings. The Administrative Procedures Act requires, at minimum, that administrative adjudicative proceedings result in a "written" decision "based on the record," and which "include[s] a statement of the factual and legal basis of the decision" as provided in Government Code section 11425.50. (Gov. Code, § 11425.10.) If the proposal is to permit a PERB hearing officer to forego writing a proposed decision, it is not clear whether the APA permits the parties to bargain around this requirement of the APA, since the "written" decision requirement is expressly identified as a *minimum requirement* for all administrative adjudicative proceedings in California. (*Ibid.*)

M.1.2 suggests implementing hard and fast timelines for responding to information requests. The difficulty with this suggestion is that it does not account for the size and difficulty of responding to the request. Even assuming a sliding scale, which permits more time, depending upon the number of pages encompassed by the request, this still does not account for the potential time needed to search all files, even if the search yields only a minimal number of pages of documents.

L.1.13 suggests scanning documents into searchable PDFs. Anything that permits or requires the agency to operate on a more electronic basis is a good thing, including accepting e-signatures.

M.1.3, H.2.1 and L.4.2 would each increase the number or frequency of mediation and/or settlement conferences, including one apparently before a complaint issues and one occurring after a proposed decision issues, but before the matter could be appealed to the Board through

filing exceptions. Unless the parties are willing to settle, these measures would simply slow down the time it takes to process a case to final resolution by the Board. For parties unwilling to settle, it would waste additional staff and resources holding unnecessary settlement conferences for cases that have no chance of settling. Encouraging parties to settle and advising them that the Board is willing to convene an informal, if it would assist in settlement seems like a better way to ensure that the Board only uses its staff and resources on settlement conferences that have some reasonable chance of settlement, as opposed to mandating settlement conferences for all cases at various points in the unfair practice proceedings.

M.2.8 suggests requiring a person with authority to settle to attend settlement conferences. I'm not sure that attendance at a settlement conference is mandatory period, though the Board agents like to present it as such. Agree that, if a settlement conference is going to be convened, only makes sense to have someone with authority from all sides.

L.1.6 suggests having the charging party submit a draft complaint along with the unfair practice charge. This suggestion would require regulatory change if it is proposed as a requirement. However, nothing precludes the charging party from submitting a draft complaint on a voluntary basis.

L.4.3 suggests increasing the "transparency" of the Board's deliberations by including more information about each case on the Board's publicly-available website. Aside from additional staff resources to review, scan, code, summarize and otherwise prepare this information for public consumption on the website, unlike an appellate or Supreme Court process where specific issues are briefed and accepted for review, the issues are not always clear in unfair practice proceedings until the Board actually decides the case. In some cases, there are unalleged violations. In some cases, there is a dispute over what issues were encompassed by the complaint. As for making the parties' exceptions, responses, etc. publicly-available on the Board's website, the major concern is, again, the staff time necessary to do that.

M..5.1 suggests clarifying and streamlining the Board's rules for granting the five-day extension of time for service by mail. The suggestion notes that the Board's regulations governing facsimile and electronic filing are different. To some extent, this distinction is a relic of the fact that facsimile filing was added separately (and presumably before) electronic filing/service, so that they appear in different parts of the regulations. To some extent, this distinction has also already been clarified by decisional law. (See *San Diego Metropolitan Transit System* (2016) PERB Order No. Ad-441-M; and *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446.)

L.5.1 suggests changing the regulations to prevent parties from "gaming the system" by filing requests for injunctive relief. It is unclear what concern is being raised here or how parties are allegedly permitted to game the system. Until the problem is clarified, no reason to change the

regulations or agency's practice with respect to injunctive relief which, in any case, is controlled to a considerable degree by judicial decisions and therefore not subject to change by PERB.

M.6.1 suggests removing the power of public agencies to implement and apply local rules governing representation matters, so that all such matters are subject to PERB's regulations and decisional law. As noted in the right-hand column, this change would require authorization outside of PERB, i.e., in this case statutory change to the MMBA and Trial Court Act, both of which allow those public employers to adopt and apply local rules. It is also not clear whether this suggestion would assist PERB in improving its efficiency, as the comment/suggestion seems more designed to save *other* public agencies the cost of handling representation matters.

H.8.3 and H.8.7 suggest various improvements to PERB's technological profile and user access to PERB's information systems. These are great suggestions that would help bring PERB into the 21st Century but, unfortunately, are also ones that require the investment of resources.